

## **Fundamental rights set adrift in the Pacific**

**Matthew Zagor**

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IT is an old and macabre tradition to design punishments as deterrents to future would-be offenders. Public executions were aimed at educating and terrifying the public as much as punishing the perpetrator.

The Romans lined the Via Appia with crucified rebellious slaves. The English displayed the severed heads of the Gunpowder Plot conspirators on the bridges into London.

The message to entrants of both imperial cities was clear: the wages of sin against the sovereign were nasty and unpleasant, so commit them at your peril.

In these anxious times, sovereignty is nowhere more jealously guarded than against those who cross borders without permission. An unlawful arrival is viewed as a threat not just to national security but to our fragile sense of national identity, already fractured by the vicissitudes of a globalising economy and the cultural confusion of the postmodern era.

It is thus unsurprising that our ministers for immigration appear increasingly like the sovereigns of old: defenders of the body politic who wield an iron fist when it comes to those who would undermine it.

They are expected to sound tough and act tough.

It is in this context that we must read the statement of Immigration Minister Kevin Andrews that transporting unlawful boat arrivals to Nauru will "send a strong message to those considering any attempt to enter Australia illegally".

It is disingenuous to say that this is merely about restricting access to mainland Australia. Many of the refugees will end up here regardless of where their claims are processed, the international community having already reached the limits of its tolerance for Australia's burden shifting refugee program.

Rather, the message is one of harshness and severity that complements the policy of indefinite mandatory detention. Designed for domestic as well as international consumption, it says that asylum-seekers who arrive without permission will be punished in order to deter others from committing the same transgression.

Yet asylum-seekers who arrive illegally in Australia, unlike the people who traffic in them, are committing no crime.

This is not a matter of opinion: it is a legal fact. Domestic migration law long ago did away with the offence of unlawful entry.

Nor, indeed, can an asylum-seeker be punished for their method of arrival under international law, which recognises that a fear of persecution may justify extraordinary methods of escape, to which national boundaries must not stand as an impediment.

And while the barbed-wire fences and holding cells of our immigration detention centres may look and feel remarkably punitive, governments have gone out of their way to ensure that no court characterise it as such.

The same would go for Nauru. The minister may stand tall under the media spotlight, but his counsel in court will say that this is neither punishment nor deterrence, merely a necessary method of exclusion.

The reason for this artifice lies in our Constitution: if detention at the behest of our executive were a punishment, it would conceivably fall foul of an implied prohibition that punishment can only be imposed by a court exercising judicial power.

Some members of the court who dislike the very idea that the Constitution might be read against the backdrop of individual rights have queried the existence of this "constitutional immunity", but for the time being it is still good law. As a result, if the purpose of detention is indeed to deter others, it would indicate a punitive purpose, and the detention would be unconstitutional.

The timing of the Nauru announcement coincided with the announcement of the citizenship test initiative. We are being asked, as a society, which values reflect what it is to be an Australian. We should remember that in a liberal democracy, liberty is a predicate to almost every facet of our lives: social, civic, personal and political.

By its very nature, being deprived of the fundamental rights of liberty and movement places a severe burden on the individual who would otherwise enjoy such freedoms.

In the hands of an increasingly powerful executive, it becomes a dangerous tool of state. This much was recognised by our law as far back as Magna Carta.

As Lord Bingham, one of Britain's most senior judges, recently pointed out, "freedom from executive detention is arguably the most fundamental and probably the oldest, most hardily won and the most universally recognised of human rights".

This is why the highest courts in the US and Britain have jealously guarded liberty of person as a foundational value, as applicable to the alien as the citizen, and not to be easily sacrificed at the executive's whim.

Unfortunately, our High Court has largely isolated itself from this global constitutionalism and the values it reflects. In 2004, to its international embarrassment, a majority on our High Court found the right of liberty less compelling than the fiction that mandatory and potentially indefinite executive detention was for a legitimate purpose: to exclude aliens from another legal fiction termed the Australian community.

Furthermore, despite the well-documented toll that our inhumane detention apparatus exacts on detainees, the court rejected an effects test for establishing what amounts to punishment, defining it so narrowly as to allow the Government essentially to legislate its way around any potential constitutional limitation.

The decision of our court that detention was not punitive, couched in the dry legalism that is enjoying an unedifying renaissance and infected with legally irrelevant concerns about rewarding "unlawfuls" for their mode of arrival, seems far removed from the practical reality we witness on our television screens in which the minister

tells the would-be refugee from war-torn Sri Lanka, Iraq or Afghanistan: "Come to Australia, and this is what we will do to you."

*Matthew Zagor is a lecturer in law at the Australian National University.*

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